

**REMY, THOMAS, MOOSE and MANLEY, LLP****ATTORNEYS AT LAW**

MICHAEL H. REMY  
1944 - 2003

TINA A. THOMAS  
JAMES G. MOOSE  
WHITMAN F. MANLEY  
ANDREA K. LEISY  
TIFFANY K. WRIGHT  
SABRINA V. TELLER  
ASHLE T. CROCKER

BRIAN J. PLANT  
OF COUNSEL

455 CAPITOL MALL, SUITE 210  
SACRAMENTO, CALIFORNIA 95814

Telephone: (916) 443-2745  
Facsimile: (916) 443-9017  
E-mail: info@rtmmlaw.com  
http://www.rtmmlaw.com

JENNIFER S. HOLMAN  
MICHELE A. TONG  
AMY R. HIGUERA  
HOWARD F. WILKINS III  
MEGAN M. QUINN  
AMANDA R. BERLIN  
JASON W. HOLDER  
MELANIE SENGUPTA  
LAURA M. HARRIS  
KATHRYN C. COTTER

December 28, 2006

Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First St. NE; Room 1A  
Washington, DC 20426

Tom Filler  
California State Lands Commission  
100 Howe Avenue, Suite 100 South  
Sacramento, CA 95823

RE: Comments on Draft EIS/EIR for the North Baja Pipeline  
Expansion Project/SCH No. 2006081127/FERC Docket  
Nos. CP 06-61-000 and CP 01-23-003.

Dear Ms. Salas and Mr. Filler:

Imperial County has retained our law firm to represent its planning and environmental interests with respect to the proposed North Baja Pipeline Expansion Project (the Project) (SCH # 2006081127). We have reviewed the Draft Environmental Impact Statement/Environmental Impact Report (Draft EIR/EIS) for the Project to assess whether the document complies with the National Environmental Policy Act (NEPA) (Title 40 C.F.R., Parts 1500-1508) and the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). **This response meets your deadline for public comment, which is on or before December 28, 2006.**

As we explain below, we have advised the County that the Draft EIR/EIS is deficient in a number of respects and is therefore legally inadequate. Several of the deficiencies cannot be cured without significant revisions to the Draft EIR/EIS and recirculation of the modified document. Others are less

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significant and yet require clarification so that the EIS/EIR can adequately function as an informational document satisfying the demands of NEPA and CEQA.

## I. BACKGROUND

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The Federal Energy Regulatory Commission (FERC) is the designated NEPA "lead agency" for the Project as it crosses federal lands in Imperial County. The FERC will utilize the environmental document to determine whether to issue a "Certificate of Public Convenience and Necessity" on the proposed Project determining that it is (or is not) in the public's interest. The California State Lands Commission (CSLC) is designated as the CEQA "lead agency" for the Project as it crosses public and private lands in Imperial County. The Draft EIS/EIR, page 1-8, states that "[t]he CSLC has the principal responsibility for carrying out and approving the Project in California, and is thus the lead agency in California for preparing the EIS/EIR, comply with the CEQA [], following the guidelines for the implementation of the CEQA [], and coordinating the review of the EIS/EIR by State and local responsible and trustee agencies []."

CEQA differs from NEPA in that, among other things, the CEQA places a relatively higher value on environmental protection, compared with economic growth. (*San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584, 590-591.) NEPA requires only that federal agencies "consider" the potential significant adverse environmental impacts of their "major" actions, as described in "environmental impact statements" (EISs). (42 U.S.C. § 4332, subds. (B), (C); *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402, 416-417.) The EIS must evaluate all reasonable alternatives and must suggest appropriate mitigation measures; however, although the agency must "consider" these proposals, it has no mandatory duty to *act* on them, even if they are feasible. (40 C.F.R. § 1502.14; *Robertson v. Methow Valley Citizens Council* (1989) 490 U.S. 332, 350.)

In other words, as to those matters subject to their statutory discretion, federal agencies can effectively ignore the conclusions of an EIS, even regarding alternatives and mitigation, and can take actions causing grave environmental damage (unless their agency-specific policies or statutes or regulations other than NEPA require otherwise). (*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (1978) 435 U.S. 519, 558.) While "NEPA exists to ensure a process, not particular substantive results," the process must be rigorously performed. (*Friends of Yosemite*

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Imperial County's comments regarding NEPA and CEQA requirements are noted. These comments, however, do not relate to the environmental issues analyzed within the contents of the draft EIS/EIR and raise no significant environmental issues. Thus, no changes to the document are necessary.

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*Valley v. Norton* (2003) 348 F.3d 789, 793.) An agency's performance will be reviewed according to the arbitrary and capricious standard. (*Ibid.*) "The determination whether the [agency] acted in an arbitrary and capricious manner rests on whether it 'articulated a rational connection between the facts found and the choice made.'" (*Ibid.* (citing *Pub. Citizen v. Department of Transportation* (9th Cir. 2003) 316 F.3d 1002, 1020).) Further, "[c]ourts must carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute . . ." (*Ibid.*)

Neither CEQA nor NEPA is invoked where the only effects of a proposed project or governmental action are purely economic or social, unless there are related physical effects. (CEQA Guidelines, §§ 15064, subds. (e), (f)(6), 15131, 15358; 40 C.F.R. § 1508.14.) CEQA has been understood, however, to be "more focused on *physical changes* than is NEPA." (Discussion following CEQA Guidelines, § 15358 (italics added).) Although analysis under each statutory scheme is triggered by the existence of either direct or indirect physical impacts, NEPA is more focused on related "human" impacts than is CEQA. (Compare 40 C.F.R. § 1508.8 (NEPA definition of "effects") with CEQA Guidelines, § 15378, subd. (a) (CEQA definition of "effects"): the former refers to "economic, social, or health" effects, while the latter does not.)

From a procedural standpoint, a federal agency's compliance with NEPA differs somewhat from a California public agency's compliance with CEQA. In many respects, CEQA requirements are more stringent. For example, NEPA's public notice requirements are less specific than those found in CEQA. (Compare 40 C.F.R. § 1506.6 with CEQA Guidelines, §§ 15062, 15072, 15075, 15082, subd. (a), 15085, 15094.) Furthermore, whereas CEQA requires an agency to prepare detailed findings and a statement of overriding considerations prior to approving a proposed project with significant environmental effects (CEQA Guidelines, §§ 15091, 15092, 15093; Pub. Resources Code, § 21081), NEPA requires a federal agency, before approving an action subject to NEPA, to adopt a less detailed "record of decision" (40 C.F.R. § 1505.2).

The preparation of an EIS under NEPA involves content requirements different from, and sometimes more extensive than, those found in CEQA. For example, the alternatives analysis found in an EIS is typically much more detailed than that typically found in an EIR. An EIS must "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits." (40 C.F.R. § 1502.14, subd. (b).) Under CEQA, in contrast,

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alternatives need only be discussed in "meaningful detail,"<sup>1</sup> although a legally adequate discussion may require, under some circumstances, a "quantitative, comparative analysis" of the differences between a proposed project and environmentally superior alternatives. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 735.)

Similarly, NEPA requires agencies, in preparing EISs, to satisfy certain detailed requirements when they confront incomplete or unavailable information. First, the agencies must acknowledge that relevant scientific information is lacking. Second, they must obtain such information, with original research if necessary, unless the costs of obtaining it are "exorbitant" or "the means to obtain it are not known." Third, if the information is unobtainable for these reasons, the agency must include in the environmental document both "a summary of existing credible scientific evidence" relevant to the issue at hand, and an evaluation of the impacts in question "based upon theoretical approaches or research methods generally accepted in the scientific community." (40 C.F.R. § 1502.22.) CEQA contains no similar express provisions; and, to date, no court has read such requirements into CEQA. (But see *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1364-1370 (EIR for proposed airport expansion was inadequate because, among other reasons, its use of "scientifically outdated information" represented a failure to undertake "a reasoned and good faith effort to inform decisionmakers and the public" about toxic air contaminants" (TACs); respondent agency also failed to prove that it made "any reasonably conscientious effort . . . to collect additional data or to make further inquiries of environmental or regulatory agencies having expertise" with respect to TACs).)

A Draft EIS also must, "to the fullest extent possible," integrate into the NEPA analysis "surveys and studies" required by statutes such as the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. § 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. § 1531 et seq.), and "other environmental review laws and executive orders." (40 C.F.R. § 1502.25, subd. (a).) Under CEQA, "[t]he environmental document preparation and review should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run concurrently, not consecutively." (CEQA Guidelines, § 15004, subd. (c).)<sup>2</sup>

<sup>1</sup> *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 406.

<sup>2</sup> See also Pub. Resources Code, § 21003, subd. (a) (requiring CEQA review to occur, to the greatest extent possible, simultaneously with other required planning and environmental review procedures); CEQA Guidelines, § 15124, subd. (d)(1)(c) (providing that the project

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In interpreting either statute, the clear statutory or regulatory language is the first and best authority as to its meaning. (See, e.g., *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 202-203 (NEPA case law governing standards for determining whether a federal agency's regulatory program, such as that of the Environmental Protection Agency, requires the "functional equivalent" of NEPA analysis does not govern such questions under CEQA, which includes a specific statute, Public Resources Code section 21080.5, creating standards different from those described in the federal cases).)

Because CEQA was modeled on NEPA, however, the California courts have often looked to federal cases interpreting the latter statute as "strongly persuasive" authority as to the meaning of the former. (See *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86, fn. 21; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 261.)

The California statute is *more* protective of the environment, however; therefore, it seems fair to say that NEPA cases generally set the environmental *floor*, but not necessarily the ceiling, for interpreting CEQA. (See *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584.) In other words, the federal cases may be persuasive authority when they require environmental protection on issues not yet reached by California courts; but the state courts may find that the federal precedents require too little protection, particularly when CEQA's *substantive* mandate is at issue.

LA9-2

The CEQA analysis must address both on-site and off-site environmental impacts, including, but not limited to, air quality, health risks, and growth-inducing impacts associated with the pipeline and the resulting projects that follow. The County is concerned with the potentially significant, adverse environmental impacts as they relate to pipeline safety, the possibility of terrorist acts against the pipeline, growth inducing impacts from the increased electrical capacity the Project would facilitate, the transmission lines transporting power out of Mexico, and in particular to future air quality impacts in Imperial County and the potential health risks to all of its residents.<sup>3</sup> Since air emissions from Baja California and Mexicali currently

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adversely affect Imperial County, any new power plant emissions that the pipeline expansion would make possible should be comprehensively addressed and mitigation measures proposed in the joint EIS/EIR. The fact that portions of the power plant/pipeline network would be located outside of California does not excuse the lack of analysis in the EIS/EIR.

description shall contain "a list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies").

<sup>3</sup> Imperial County also hereby incorporates by reference the more detailed comments of the Imperial County Air Pollution Control Board, submitted on December 19, 2006.

LA9-2

Reliability and safety issues are addressed in Section 4.14. An analysis of the growth-inducing impacts of the Project is presented in Section 4.16. The air quality impacts of construction and operation of the Project are discussed in Section 4.12.4.

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See the response to comment FA6-3.

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## II. GENERAL COMMENTS

LA9-4 Generally, the lack of detail provided in the Draft EIS/EIR is legally unacceptable. An environmental impact report, or "EIR," is intended to be "a *detailed* statement prepared under CEQA describing and analyzing the significant effects of a project and discussing ways to mitigate or avoid the effects." (CEQA Guidelines, § 15362.) The purpose of an EIR is to provide agencies and the public with *detailed* information about the environmental effects of proposed projects, to list ways in which the significant effects might be minimized, and to indicate alternatives. (Pub. Resources Code, § 21061.) As the California Supreme Court explained, it is "CEQA's fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404 (*Laurel Heights I.*)) "'To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions.'" (*Ibid.*, quoting *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.) In short, "[a]n EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Laurel Heights I., supra*, 47 Cal.3d at p. 404.) This Draft EIS/EIR provides very little analysis of potential impacts even in the most complex, technical areas such as air quality and cumulative impacts.

Furthermore, the Draft EIS/EIR makes frequent references to more complete explanations to be found in various appendices. One court recently criticized this approach, stating that "a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis'" in the text of the EIR. (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239, quoting *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 722-723.)

LA9-5 The County believes that the EIS/EIR fails to fully disclose, analyze and mitigate all potentially significant cumulative impacts of the Project. As is well-known, CEQA requires analysis of the environmental "effects" of a proposed action or project. CEQA Guidelines section 15358, subdivision (a), defines "effects" to include direct effects and "[i]ndirect or secondary effects which are *caused by* the project and are later in time *or* farther removed in distance, but are still reasonably foreseeable." (Emphasis added.) Direct and indirect significant effects of a project must be "clearly identified and described, giving due consideration to both the short-

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LA9-4 The proposed Project, as defined for the NEPA and CEQA analysis, allowed for the preparation of the EIS/EIR in accordance with NEPA, Council on Environmental Quality (CEQ) guidelines, the CEQA, and other applicable requirements. The EIS/EIR is comprehensive and thorough in its identification and evaluation of the environmental impacts of the proposed Project and feasible mitigation measures to reduce those effects wherever possible to less than significant levels. The EIS/EIR includes sufficient detail to enable the reader to understand and consider the issues raised by the proposed Project and the Agency Staffs believe that it is appropriate to summarize the contents of the appendices in the text of the document while referring the reader to specific appendices for additional details.

LA9-5 The potential cumulative impacts attributable to the proposed Project are adequately addressed in Section 4.15 pursuant to applicable NEPA and CEQA requirements. Section 4.15 includes an analysis of both direct and indirect cumulative impacts that could occur if one or more of the other reasonably foreseeable projects within the counties affected by the Project were constructed.



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term and long-term effects.” (CEQA Guidelines, § 15126.2, subd. (a).) CEQA Guidelines section 15064, subdivision (d)(3), states that “[a]n indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project.”

“Indirect or secondary effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems.” (CEQA Guidelines, § 15358, subd. (a)(2).)

LA9-6

Furthermore, it is well-established that “an EIR must include an analysis of future expansion *or other action* if: (1) it is a reasonably foreseeable *consequence* of the initial project; and (2) the future expansion or other action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 396 (emphasis added).) Notably, CEQA case law assumes that “quantitative” information is generally required for meaningful analysis. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 735 (*Kings County Farm Bureau*) (analysis of project alternatives was deficient because of lack of “quantitative, comparative analysis”).)

As the Court of Appeal noted in *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 157 (*Stanislaus Audubon*), in requiring an EIR for a growth-inducing resort project, “[t]he current agricultural zoning of the surrounding acreage is also not determinative. Zoning is subject to change and amendment of a general plan is not a rare occurrence.” In other words, changing economics often overwhelms the good intentions embodied in planning documents adopted under different economic circumstances. (See also *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2005) 133 Cal.App.4th 154, 214 (*Bay-Delta*) (“[i]n determining if a project has growth-inducing impacts, courts generally look to whether the project sets in motion market forces that can lead to economic pressure for growth”).)

Here, the Project dramatically increases the capacity to transport natural gas through the pipeline networks. It is reasonably foreseeable that the increased availability of natural gas will lead to the growth of many industries and activities that rely on natural gas. Potential adverse, secondary environmental impacts of the expanded pipeline network, include, but are not limited to, population and housing growth, traffic impacts and air quality impacts. These are *reasonably foreseeable consequences* of the Project, FERC and CSLC are legally obligated to include a more detailed and accurate analysis of all secondary effects of the Project in a revised Draft EIS/EIR. (See CEQA Guidelines, § 15144; *Laurel Heights I*, *supra*, 47 Cal.3d at p.

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In Section 4.16, it is acknowledged that the increased diversification of gas supply that would be a result of the proposed Project could lead to a positive economic environment conducive to growth. However, the existing power plant that would be supplied by the North Baja Pipeline Expansion Project (i.e., the IID El Centro Generating Station) would not be solely dependent on the gas supplied by the Project. Potential infrastructure growth might occur with or without the construction of the pipeline and thus would not be attributable to the proposed Project. Section 4.16 further acknowledges that to the extent that the IID Unit 3 Repower Project would diversify its suppliers of natural gas, the additional gas supplied by the proposed Project could be a growth-inducing impact. The consideration of any additional growth-inducing impacts beyond those addressed in the EIS/EIR is unwarranted because they would be too speculative.

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LA9-6 (cont'd) 396.) The potential growth-inducing impacts caused by this Project are significant, and are seriously understated, and in some instances ignored, by the EIS/EIR as currently drafted.

LA9-7 Without better and more complete analyses of the direct and reasonably foreseeable indirect environmental consequences of the Project, as well as significantly improved mitigation measures addressing those effects, the County cannot yet determine whether the benefits of the Project outweigh its undeniable, though still ill-defined, adverse environmental impacts. Such a revised document, first of all, must sufficiently address and analyze the full range of significant environmental impacts of the Project, and, second, must include tough but feasible mitigation measures to reduce such impacts to less-than-significant levels.

As you will note below, these comments identify numerous issues that require full-scale reconsideration in a revised Draft EIS/EIR. Absent such analyses, the County regrets that it cannot provide more substantive comments for many of the subjects addressed by the current Draft EIS/EIR. Unfortunately, in many respects the current analyses and proposed mitigation measures are simply too superficial and vague to allow for meaningful evaluation and comment. The County looks forward to providing further comments on a revised and recirculated document.

#### SPECIFIC COMMENTS

##### Section 2: Project Description

Page	Comment
LA9-8 2-1	<p>In order to be legally adequate, "[a]n EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published . . . from both a local and regional perspective." (CEQA Guidelines, § 15125, subd. (a).) Further, "[t]his environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (<i>Ibid.</i>) Further, the environmental setting should be described for each resource in those respective chapters, as it may vary from resource to resource.</p> <p>There is no description of the "Environmental Setting" included in the Draft EIS/EIR. Thus, the County, the public and other agencies do not have enough information to understand the environmental baseline for the Project and therefore the context and comparative significance of any changes to the existing environment. The Draft EIR/EIS is</p>

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LA9-7 See the responses to comments PM1-5 and LA9-4.

LA9-8 As discussed in the introduction to Section 4, the section describes the affected environment as it currently exists (baseline conditions) and discusses the environmental consequences of the proposed Project for each of the following major resource topics: geology; soils; water resources; wetlands; vegetation; wildlife and aquatic resources; special status species; land use, special management areas, recreation and public interest areas, and aesthetic resources; socioeconomics; transportation and traffic; cultural resources; air quality; noise; reliability and safety; cumulative impacts; growth-inducing impacts; and environmental justice. See also the response to comment PM1-5.